

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 343 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

RAJNIKANT RAMANLAL DALAL (DECD.)

Versus

AMARSINHJI MILLS LTD.

Appearance:

1. Civil Revision Application No. 343 of 1998
MS MAMTA R VYAS for Petitioner No. 1-5
MS PRATIKSHA LAHERI for MR AS VAKIL for Respondent No. 1
DELETED for Respondent No. 2
-

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 27/04/2004

ORAL JUDGEMENT

By filing this revision application under Section 115 of C.P.C., the petitioners have challenged the order

passed by the Executing Court in Execution Petition No.211/1991.

2) Initially, the respondent No.1 instituted a suit being Suit No.861/1980, against one B.K.Textiles Ltd., which was a partnership firm, for recovery of certain amount. It seems that the said suit was compromised between the parties and as per the compromise, an amount of Rs.19,000/- was agreed to be paid by defendant No.1, Rajnikant Ramanlal Dalal to respondent No.1 herein-original plaintiff, by monthly installment of Rs.500/-.

3) Initially, the decree holder filed an application for execution being Execution Application No.747/1986, but the same was dismissed for default on 13-4-1988.

4) Thereafter, the decree holder filed another application, being Execution Application No.211/1991 on 6-3-1991. In that Execution Application, on behalf of the present petitioners, an application was submitted at Exh.71 with a prayer that the said Execution Application is not maintainable as the earlier execution application was already dismissed and as the present petitioners, who are the heirs of judgement debtor No.2, have not got any property of B.K.Textiles Ltd., execution application filed against them is not maintainable.

5) The executing Court came to the conclusion that initially execution application was dismissed for default under Sub-rule (2) of Rule 105 of Order 21 of C.P.C., and therefore, the present execution application is not barred, for which the executing Court has taken resort to Rule 106 of Order 21 of C.P.C. The executing Court came to the conclusion that since the earlier application was dismissed for default, it cannot be said that the present execution application is not maintainable, especially when the earlier application was rejected for want of appearance of the decree holder and, therefore, the executing Court has come to the conclusion that the execution petition is maintainable. The executing Court has also found that the conduct of the judgement debtor No.2 is also not proper, as even though the execution application is filed in the year 1991, objections were raised for the first time in the year 1997.

6) Considering the reasoning given by the Executing Court, I am of the view that this is not a case in which this Court should exercise its power under Section 115 of C.P.C. By the impugned order, the executing Court has

decided to proceed with the Darkhast on merits and in accordance with law, instead of rejecting the same on the ground that the same is not maintainable, in view of the earlier execution application having been dismissed for non-prosecution. It is true that the decree holder should have applied for restoration of earlier execution application, instead of filing fresh application, but, in any case, the earlier application was never decided on merits. Therefore, in my view, the subsequent execution application is not barred and the same is maintainable.

7) At this stage, Ms. Pratiksha Laheri, learned advocate for the respondent has relied upon the decision of the Honourable Supreme Court rendered in the case of Shivshankar Prasad Sah & another V. Baikunth Nath Singh & Ors., reported in AIR 1969 SUPREME COURT, 971, wherein the Apex Court has held in para 6 as under :

" The Courts in India have generally taken the view that an execution petition which has been dismissed for the default of the decree-holder though by the time that petition came to be dismissed, the judgement-debtor had resisted the execution on one or more grounds, does not bar the further execution of the decree in pursuance of fresh execution petitions filed in accordance with law - see Lakshmibai Anant Kondkar V. Ravji Bhikhaji Kondkar, 31 Bom. LR 400 = (AIR 1929 Bom 217). Even the dismissal for default of objections raised under Section 47, Civil Procedure Code does not operate as res judicata when the same objections are raised again in the course of the execution - see Bihar Das Pal V. Girish Chandra Pal, AIR 1923 Cal 287; Bhagwati Prasad Sah V. Radha Kishun Sah, AIR 1950 Pat 354; Jethmal V. Mst. Sakina, AIR 1961 Raj 59. Bishwanath Kundu V. Smt. Subala Dassi, AIR 1962 Cal 272. We do not think that the decision in Ramnarain V. Basudeo, ILR 25 Pat 595 = (AIR 1947 Pat 298) on which the learned Counsel for the appellant placed great deal of reliance is correctly decided. Hence, we agree with the High Court that the plea of res judicata advanced by the appellant is unsustainable."

8) In view of above, in my view, since the earlier execution application was not dismissed on merits, the present execution application is maintainable and, therefore, the trial Court is perfectly justified in coming to the conclusion that the present execution

application is maintainable.

9) It seems that before the trial Court, the present petitioners submitted objections only on the ground that since the earlier application was dismissed for default, present application is not maintainable. Objections were also raised on the ground that this execution application is not maintainable against the heirs of original judgement debtor No.2. However, so far as this argument is concerned, the executing Court has not dealt with it in its order whereby it is held that the present execution application is maintainable. This point is kept open for the executing Court and now the executing Court shall decide the same in accordance with law by taking into account the argument of both the sides.

10) It is clarified that this judgement is restricted only to the point of maintainability of the execution petition, as it is held that the execution application is not barred by res judicata. However, if any other law point is involved, the same to be decided on its own merits and the executing Court shall decide the same in accordance with law. The executing Court shall now proceed with the said execution petition and dispose of the same expeditiously and in accordance with law.

11) Subject to what is stated above, this revision application is rejected. Rule is discharged. Interim relief stands vacated. No costs.

(P.B.Majmudar, J.)

/malek